

An appeal

- by -

Dan Pinette operating as Grizz Holdings
(“Grizz Holdings”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2004A/62

DATE OF DECISION: June 29, 2004

DECISION

SUBMISSIONS

Dan Pinette on his own behalf

Joe LeBlanc on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Dan Pinette, operating as Grizz Holdings (“Grizz Holdings”) of a Determination that was issued on March 5, 2004 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Grizz Holdings had contravened Part 3, Section 18 of the *Act* in respect of the employment of David Anderson (“Anderson”) and ordered Grizz Holdings to pay Anderson an amount of \$1833.59.

The Director also imposed an administrative penalty on Grizz Holdings under Section 29(1) of the *Employment Standards Regulation* (the “*Regulations*”) in the amount of \$500.00. The total amount of the Determination is \$2333.59.

Grizz Holdings says the Director failed to observe principles of natural justice in making the Determination. The specific assertion in this respect is that the “Director did not consider or allow all of the evidence supporting my position that Mr. Anderson was a sub-contractor”. The appeal asks that the Tribunal consider all the evidence and determine that Anderson was a sub-contractor.

The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in this appeal is whether Grizz Holdings has shown there is an error in the Determination that allows or justifies the Tribunal’s intervention under Section 115 of the *Act*.

THE FACTS

Anderson complained to the Director that he was not paid all wages owed to him for work performed for Grizz Holdings.

Grizz Holdings took the position with the Director that Anderson was not an employee, but was an independent contractor and not covered by the *Act*.

The parties agreed that if Anderson was an employee for the purposes of the *Act*, he was owed wages in the amount of \$1780.00 to cover a period from June 16, 2003 to July 11, 2003.

An oral hearing on the complaint was conducted by the Director who decided, after reviewing the evidence provided and applying tests commonly used to determine whether a particular relationship is

that of employee/employer or independent contractor/contractor, that Anderson was an employee under the *Act*.

ARGUMENT AND ANALYSIS

The burden is on Grizz Holdings, as the appellant, to persuade the Tribunal that the Director committed some error in making the Determination the Tribunal should intervene to correct that error. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the complaint process. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- a) *the director erred in law;*
 - b) *the director failed to observe the principles of natural justice in making the determination;*
 - c) *evidence has become available that was not available at the time the determination was made.*

A substantial part of this appeal simply represents an attempt by Grizz Holdings to have the Tribunal review the facts and reach different conclusions than those reached by the Director. That is not a recognized ground of appeal. The appeal must be confined to those grounds listed in subsection 112(1), above.

In that context, the sole ground of appeal raised by Grizz Holdings is that the Director failed to observe principles of natural justice in making the Determination. The inference left by the submissions made on this ground is that the Director refused to accept relevant evidence presented by Grizz Holdings and, either because of that refusal or generally, failed to give effect to relevant evidence.

In response, the Director says there was only one item which was not accepted by the Director during the investigation hearing – a letter from Anderson’s ex-partner commenting on Anderson’s driving ability. The Director says the letter had no probative value on the issue of the relationship between Anderson and Grizz Holdings. Grizz Holdings has not challenged that response from the Director. I agree with the Director that the letter, as described, had no relevance or probative value to the issue that had to be addressed by the Director and its rejection had no effect on the fairness of the process to Grizz Holdings.

Otherwise, there is no indication in the appeal that Grizz Holdings was denied an opportunity to present its case and no natural justice concerns are apparent.

It appears, although not identified as a ground of appeal, that Grizz Holdings seeks to have the Tribunal consider additional evidence and has provided evidence with the appeal that does not appear in the record. The Director has not objected to that evidence, but says it does not show that Anderson was a sub-contractor, and not an employee under the *Act*.

Having reviewed this material, I reach two conclusions about it. First, it does not satisfy the criteria which the Tribunal uses to decide whether “new” evidence will be accepted on appeal. Second, and once

again I agree with the Director, this new material does not assist Grizz Holdings on the issue of Anderson's status under the *Act*. As the Director points out in reply, while some comments found in the transcript of the telephone conversation between Anderson and Mr. Pinette indicate Anderson was under the impression he was a sub-contractor, it is not uncommon for parties to believe they have an independent contractual relationship which, on proper analysis, is found to be an employment relationship under the *Act*. In such cases, and this is one, the complete answer to whether such a belief can be given effect is found in Section 4 of the *Act*, which says:

4 *The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4) has no effect.*

Simply put, agreeing, or believing, a relationship is not governed by the minimum requirements of the *Act* is not determinative. It was appropriate for the Director to look at the facts governing that relationship, to apply those facts to the tests typically used to determine the true character of that relationship and to decide that relationship is one of employer/employee and, accordingly, governed by the *Act*.

In sum, I can find nothing in the appeal supporting a conclusion that the Director failed to observe principles of natural justice, or committed any other error, in making the Determination and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determinations, dated March 05, 2004, in the amount of \$2333.59 be confirmed, together with whatever interest has accrued on the wage portion of that amount under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal